



## International Comparative Jurisprudence



### THE ROLE OF THE WTO DSB IN MODERNIZING WTO LAW ON E-COMMERCE

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**Abstract.** Laws must be modernized in accordance with shifting market conditions and the modernization of trading patterns. The regulation of e-commerce, however, is still not provided for in the WTO legal system, and current debate suggests that no substantial agreements will be reached in the near future. As a result, e-commerce is neither regulated nor left to self-regulation because of the different standards applied across borders. This article outlines the applicability of the existing WTO law that regulates the legal relations of e-commerce. The findings of this research are relevant not only for meeting existing market characteristics, but also for predicting possible scenarios in case of the UK's withdrawal from the EU without an agreement as WTO rules, which do not exist in e-commerce, will apply to international trade relations with the UK.

**Keywords:** WTO law; international e-commerce; WTO DSB

#### Introduction

The digitalization of services added new dimensions to the international market (Braga, 2008). Being the key player in regulating international trade and involving the majority of states engaging in cross border e-commerce, the WTO requires both long and short-term solutions for restating its role in the digital economy. Moreover, the WTO has the capacity to provide comprehensive multilateral regulation of e-commerce, as it is often referred to as the most convenient institutional umbrella for multilateral commitments in e-commerce related issues (Wunsch-Vincent, 2006). The general acknowledgment that the existing GATT (1994) and GATS (1994) rules and obligations unambiguously apply to digital trade transactions is secured (Braga, 2008).

At the international multilateral level, e-commerce remains unregulated as there are no legally binding or uniform e-commerce legal regulations. With the emerging bilateral or multilateral agreements e-commerce is not left for self-regulation, leading to fragmented regulation that leads to uncertainties and possible barriers to the free flow of international trade. Acknowledging the importance of e-commerce, the WTO Member States enacted the Work Programme on Electronic Commerce decades ago (Work Programme on Electronic Commerce, 1998). However, any substantial agreements on regulating global digital trade have yet to be made. Debates have been renewed since the World Economic Forum in Davos (2019) as 76 partners (the EU and the 48 other members of the WTO) agreed to start negotiations on global rules on electronic commerce (Joint Statement on Electronic Commerce, 2019). The latter, however, seem to be at a standstill.

The aim of this article is to determine the possible short-term solutions in the WTO legal system to ensure the smooth flow of international e-commerce, and to create an enabling environment for cross-border digital trade going forward. This article explores how current WTO rules may be applied in terms of e-commerce. Based on

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the analysis of the competencies, practices, and role of the WTO Dispute Settlement Body (hereinafter – the WTO DSB) this study provides preconditions for relying on the DSB for mitigating possible e-commerce regulatory discrepancies. Given that WTO negotiations on e-commerce are at a standstill, and that a major shift in the international market may occur due to the UK leaving the EU without an agreement, this study and its results are relevant in the sense that they establish grounds for efficient short-term solutions.

Accordingly, the tasks of the research are as follows:

1. To analyze the current state of e-commerce regulation under WTO law.
2. To distinguish the peculiarities of WTO law and the role of the WTO DSB, and how these peculiarities precondition its engagement in modernizing WTO law.
3. To analyze the WTO DSB reports in recent e-commerce cases put before the WTO DSB.

This topic of study has not been analyzed by Lithuanian scholars. Studies on the role of WTO DSB in ensuring a smooth flow of international e-commerce are fragmented, and the scientific discourse lacks a comprehensive approach to tackle discrepancies in the field of e-commerce. This article examines, compares, and builds upon existing research, in particular: WTO Member State case studies (Kamel, 2008; Panagariya, 2000; Farrokhnia & Richards, 2013; Wunsch-Vincent, 2006); the regulation of e-commerce under separate multilateral agreements (Monteiro & Teh, 2017); and WTO DSB reports on e-commerce (Wunsch-Vincent, 2006; Hayer, 2004). This study is scientifically relevant as it engages in ongoing discourse on the role of WTO in the digital age. It also provides possible short term adjustments that involve reliance on the WTO DSB to ensure the free flow of the digital economy, by linking the role of the WTO DSB with the peculiarities of regulating e-commerce under WTO law.

The document analysis method is applied to collect primary data and to analyze the provisions of WTO agreements, reports of the WTO DSB, and the relevant positions of authoritative scholars. The linguistic method is used to determine the content of the provisions used and their meanings in relevant sources. The teleological method is used to distinguish the content and scope of the provisions of the WTO Treaties. The method of systemic analysis and classification is employed to divide the object of the research, its purpose, and tasks into components. It also allows us to assess the internal structure of relevant documents and their interaction with each other in order to identify the complexity of the topic and its most significant aspects. The logical analysis method is used to identify, associate, and generalize the material of the research, and to evaluate the relevant aspects of legal documents, the possibilities of their interpretation, and the reasonableness and consistency of the research problem.

## **1. Current regulation of e-commerce under WTO law**

Initially WTO Agreements were adopted without taking into account the phenomenon of e-commerce, and thus such services are not directly covered by WTO law (Weber, 2010).

The importance of regulation of electronic commerce was first emphasized in the Declaration of 1998 adopted by the Geneva Ministerial Conference, according to which the States committed to introducing regulations of e-commerce (Declaration on Global Electronic Commerce, 1998). Soon after, the WTO General Council adopted a note to assist WTO Members on trade-related issues pertaining to electronic commerce (WTO Agreements and Electronic Commerce, 1998; hereinafter – the Note). The Note contains recommendations and basic guidelines for interpreting the WTO rules in e-commerce until a coherent mechanism under WTO law is established. Given the recommendatory nature of the Note, the only obligation the WTO Members committed to is to continue not imposing customs duties on electronic transmissions under the Declaration (1998).

Accordingly the WTO Work Programme on Electronic Commerce (1998; hereinafter – Work Programme) was introduced to cover issues related to digital trade. However, the States only agreed not to charge import duties on

electronic transmissions (Ministerial Declaration, 2001). At the Ninth Ministerial Conference, the States reached an agreement merely to continue their current practice of not imposing customs duties on electronic transmissions (Draft Ministerial Decision, Ninth WTO Ministerial Conference, 2013). The Eleventh Ministerial Conference held in 2017 ended up producing no binding results on regulating e-commerce, and thus the Declaration of 1998 and the subsequent Note (1998) are the primary sources of guidelines for international e-commerce. Therefore, regardless of the acknowledged importance of harmonizing international trade, WTO negotiations have been barren thus far.

Initially, electronic commerce was defined by the nature of the production, distribution, sale, or delivery of goods or services, i.e. it must be operated by electronic means (Work Programme, 1998, para. 1.3). The concept was developed by distinguishing the nature of the service or product, and the means of distributing the service or goods. Thus the concept of e-commerce also covers cases where the entire transaction takes place electronically (Note, 1998, para. 10). However, so far regulations are of a recommendatory nature. Given the progress of introducing regulations on digital commerce, it may be assumed that no substantial agreement on the regulations will be reached in the near future. Whilst multilateral negotiations are at a standstill, Member States have already addressed the WTO DSB to settle cases on e-commerce issues.

## **2. The role of the WTO DSB under WTO law**

WTO Agreements (Marrakesh Agreement Establishing the World Trade Organization, 1994; GATT, 1994; GATS, 1994; Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, 1994 (hereinafter – DSU); all together referred to as WTO Agreements) emerged as a means of eliminating protectionism and ensuring the liberalization of the international market (Bown, 2009). The formation of the WTO created preconditions for shaping the predictability and clarity of international trade, as the organization not only acts as a platform for the WTO Member States to negotiate the conclusion of international treaties, but also establishes a compulsory judicial dimension (Weiler, 2001). Irrespective of its ambition, the WTO has been slow in addressing contemporary matters of international digital trade.

Despite debates on the impotence of the WTO in regulatory matters, the WTO DSB is worth looking into as it has had a role in modernizing existing WTO law. WTO Agreements are incomplete contracts, thus WTO “courts” have a duty to complete agreements by adding missing information (Horn et al., 2006; Mavroidis, 2009; Mavroidis & Horn, 2004). The judicial function of the WTO and the function of interpreting the law are delegated to the WTO DSB, which has the authority to establish panels, and adopt panels and Appellate Body reports (DSU, 1994, Art. 2(1)). The political role of the WTO DSB does not influence the essence of the dispute settlement process (Dawey, 2000), nor does it formally create substantial legal consequences (Roessler, 2001). Thus, the panels and Appellate Body act independently in the legal interpretation of WTO law. WTO panels and the Appellate Body are not called “courts” but, de facto, this is what they are, and thus the actual function performed by the WTO DSB is the judicial interpretation of WTO Agreements and settling disputes (Weiler, 2001). For the purpose of this research the judicial dimension of the WTO – consisting of panels, the Appellate body and DSB – is collectively referred to as “WTO Courts” or “Court(s)” when speaking generally.

The following sections emphasize the status of the WTO panels and Appellate Body as court-like institutions (Bossche, 2008) and the peculiarities of the procedures of dispute settlement under WTO law.

### **2.1. The binary function of WTO law and WTO DSB**

The binary nature of WTO Agreements is relevant to their interpretation. These agreements may be deemed as multilateral contracts between certain parties, with the intent being to regulate relations and trade-related aspects that will arise in the future. On the other hand, WTO law encompasses provisions of both primary and secondary importance, meaning that the Agreements are not aimed at particular trade relations between states, but at providing general guidelines for economic cooperation. With the establishment of the WTO DSB as the judiciary

arbitrator, the WTO legal system may be deemed as a modern independent legal system (Palmer & Mavroidis, 1998). Accordingly, in interpreting WTO Agreements WTO Courts must carry out a binary function. They must both interpret the law so that the rights and obligations of concrete parties of the dispute will be protected, and ensure the security and predictability to the multilateral trading system (Art. 3(2), DSU, 1994). Thus the WTO DSB must not only settle the dispute between parties, but in so doing the Courts must also reach such a decision that would, if not promote, at least not diminish the security and predictability of the trading system.

## **2.2. Legal sources under WTO law**

WTO law does not provide an exhaustive list of legal sources applicable to the interpretation of WTO law and the solving of disputes. WTO Courts must follow the customary rules of interpretation of public international law (Art. 3(2), DSU, 1994). Under established practice (Appellate Body report in *United States – Standards for Reformulated and Conventional Gasoline*, 1996; hereinafter *US-Gasoline*), these are the rules laid down in the Vienna Convention on the Law of Treaties (Vienna Convention on the Law of Treaties, 1969; hereinafter – the Vienna Convention). Yet the Convention does not provide an exhaustive list of legal sources, so it can also be considered an incomplete contract – meaning that WTO Courts must interpret an incomplete contract with another incomplete contract (*US-Gasoline*, 1996). Moreover, the Vienna Convention provides preconditions to apply supplementary means of interpretations without describing what these means could be (Art. 32, Vienna Convention, 1969). Thus, WTO Courts can decide on the means of interpretation of their choosing (Appellate Body report in *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, 2005; *EC-Chicken Cuts*). This WTO Agreement interpretation methodology presupposes that WTO Agreements should not be interpreted in isolation (*US-Gasoline*, 1996), and that the discretion of WTO Courts to decide on the means of treaty interpretation are not a priori limited by law (*EC-Chicken Cuts*, 2005).

Scholars argue that, under Article 7 of the DSU (1994), WTO Courts are only allowed to apply sources of WTO law (Trachtman, 1999). Marceau (1999) argues that the WTO DSB is prohibited from applying other sources of law than the WTO law, since the jurisdiction of the WTO DSB is limited. Others state that Article 7 DSU enables the Courts to apply sources beyond the WTO legal system. Palmer and Mavroidis (1998) argue that, in interpreting Art. 7 DSU, legal sources of the WTO DSB can be prior GATT and WTO DSB reports, international customs, and general principles of international law. Under Article 7 DSU (1994), the Court may also apply any agreements cited by the parties to the dispute. The systemic analysis of paragraphs 1 and 3 of Article 7 DSU (1994) suggests that the WTO Court may be granted non-standard mandates to apply not only the WTO covered agreements but also other relevant sources of law. In the practice of WTO DSB, the set terms of reference under Article 7 DSU (1994) are not aimed at limiting the scope of sources of law, and are not aimed at excluding reference to the broader rules of customary international law (Panel report in *Korea – Measures Affecting Government Procurement*, 2000).

Art. 13 of the DSU (1994) provides the WTO DSB with the right to seek information and technical advice from any individual or body which it deems appropriate, and the ability to seek information from any relevant sources. The latter shows that the Courts are not limited to the isolated interpretation of WTO Agreements, but may also seek additional information. Amicus curiae briefs (statements provided by subjects that are not parties of the dispute but show a certain interest in it) may be considered as one of the means of obtaining the necessary information in the case. The Court reserves the right to either request an amicus curiae brief or to decide to accept the presented brief on the initiative of the subject when it deems it necessary (Appellate Body report in *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, 2000). The right of WTO DSB to obtain information and consultations is not limited, thus providing the Court discretion in deciding on the relevant sources.

In practice the aforementioned right to obtain information and necessary consultations, together with the right to determine the working procedural rules (Art. 12(1) DSU, 1994), may be applied firstly to enable WTO Courts to depart from the proscribed procedural rules with the consent of the parties of the dispute. Secondly, it allows

the discretion of the Court to decide on the admissibility of any information or statement provided by parties of the dispute and third parties (Appellate Body report in United States – Import Prohibition of Certain Shrimp and Shrimp Products, 1998). Accordingly, the Courts obtain discretion to decide on applying a wider span of arguments in cases where it is deemed necessary (Appellate Body report in United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, 2000), as long as it is not contrary to the WTO Agreements.

Just as in domestic courts, WTO Courts frequently make laws in the course of resolving disputes (Ginsburg, 2004). The main arguments of critics suggest that the DSB is unilaterally expanding its authority, leading to a violation of WTO law. Critics also argue that the activities of the WTO DSB are overlapping with the competencies of the WTO Member States in rule-making (Minutes of the Meeting, 2000), accordingly undermining the basic values of the WTO (Kelly, 2002) such as the rule of consensus. In this context it must be emphasized that judicial law-making is inherent to systems where the main treaties to interpret are incomplete in their essence (Zeitler, 2005). Moreover, the WTO DSB has the sole discretion to adopt (or dismiss) a panel or Appellate Body report, thus the WTO DSB consisting of all of the WTO Member States makes decisions in cases. The WTO DSB shall adopt a report unless WTO Member States reach a “negative consensus” on not approving the report (Art. 6(1), 16(4), 17(14), 22(6) DSU, 1994). Therefore all of the WTO Member States engage in judicial decision-making.

Due to expanding digital trade, an increase in the number of disputes before the WTO DSB is likely, thus the WTO DSB seems to have the theoretical capacity to facilitate regulation of digital commerce.

### **3. Modernizing WTO law in recent practice relating to e-commerce**

The phenomenon of e-commerce was not relevant during the negotiations of WTO Agreements, thus such services are not explicitly covered by WTO law (Rolf, 2010). However, the WTO Member States agreed to engage in regulating e-commerce multilaterally, thus stressing the importance of the WTO in regulating digital trade.

Given the particular state of e-commerce under WTO law, it becomes clear that the role of WTO DSB is significant in ensuring the basic values of the WTO in the short-term until an agreement is reached. The analysis of the WTO DSB functions and its discretion (Section 2) shows that the WTO DSB has both the duty and capacity to engage in completing an incomplete WTO law. Yet, in cases of e-commerce, the limits of the discretion of WTO Courts are unclear. The WTO DSB has a duty to interpret WTO Agreements. However, it is quite a different obligation to interpret treaties and add content into them that was not there before. Thus it is necessary to empirically analyze whether the Courts practice judicial restraint or engage in judicial law-making in e-commerce cases.

#### **3.1. Regulating electronic gambling under WTO rules**

The first dispute before the WTO DSB, the US-Gambling (Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, 2005) case, concerned various US measures limiting trans-border gambling and betting services. The US has consistently imposed tight regulations on the remote supply of gambling, and has expanded the regulatory regime for the remote supply of gambling so that it now addresses the Internet (US-Gambling, 2005). The dispute revolved around the US opening the gambling market in its GATS Schedule (US-Gambling, 2005). The US argued that restrictions on remote gambling services are not “quantitative limits” within the ambit of Article XVI:2 which formed the substance of the case (US-Gambling, 2005). The dispute mostly concerned the question of whether a prohibition on the cross-border electronic supply of gambling services is a limitation under the GATS. The Panel concluded that the prohibition, amounting to a zero quota, is a quantitative limitation, and therefore constitutes a limitation on the number of service suppliers in the form of numerical quotas within the meaning of Article XVI:2 (US-Gambling, 2005). By prohibiting the supply of services in terms of which market access commitment has been undertaken, the US measures at issue amount to a zero quota on service operations or output with respect to such services. The Appellate Body upheld the panel’s finding that a measure prohibiting the supply of certain services where specific

commitments have been undertaken is a limitation (US-Gambling, 2005). The stance of the Appellate Body in the case may be determined as displaying its role in “modernizing” the WTO legal system, and adopting new concepts to ensure proper interpretation of applicable law in e-commerce cases (Peng, 2014).

### **3.2. Regulating online music downloads in China-Audiovisual**

The China-Audiovisual case (2010) concerned the online transactions of music recordings. In its GATS Schedule, China made both market access and national treatment commitments for facilitating sound recording distribution services by enabling foreign suppliers to engage in joint ventures with national partners. So foreign subjects should enjoy national treatment, however Chinese law limits the ability of foreign-invested enterprises to engage in distribution of sound recordings by prohibiting these enterprises from engaging in their electronic distribution via the Internet. China argued that online music services are a new type of service which emerged after its accession, and are different in kind from the “sound recording distribution services” committed by China, thus are not covered by its commitments.

The US argued that GATS is technologically neutral, as it does not contain any provisions that distinguish between the different technological means through which a service may be supplied. The US referred to the report in the US-Gambling, where the panel stated that a market access commitment implies the right of other Members’ service suppliers to supply a service through all means of delivery, including the Internet. The US invoked the principle of technological neutrality, however the Panel did not address or further elaborate on this issue. The Appellate Body analyzed China’s commitments as being formulated in generic terms, arguing that States assume that such terms as sound recording and their distribution may develop through time (Gardiner, 2008).

### **3.3. Regulating electronic payment services**

In the dispute raised by the US against China on regulating electronic payments, the US claimed that China undertook to provide both market access and national treatment for all payment and money transmission services, including credit, charge, and debit cards China (Certain Measures Affecting Electronic Payment Services, 2012). Allegedly however, under the measures of China WTO Member States could only supply such services for payment card transactions denominated in foreign currencies (Weber, 2012). China also required all card-payment devices to be compatible with that entity’s system (Weber, 2012), thus leading to the possible infringement of its commitments under WTO law.

The Panel provided a broad definition of “all payment and money transmission services” by including the electronic payment services supplied in connection with credit, charge, and debit cards, and other payment card transactions (China-Electronic Payment, 2013). The scope of “electronic payment services” encompasses payment, money, and transmission, and all kinds of activities which manage, facilitate, or enable the act of making a payment (Weber, 2012). Thus, regardless of China’s arguments of its limited scope of obligations under WTO law schedules, the Panel decided on a broad definition (and thus expansion) of China’s commitments.

The analysis of relevant disputes and the stance of the WTO DSB in these disputes shows that in cases of e-commerce the WTO DSB vigorously engages in the role of modernizing WTO law and filling in the gaps due to undetermined regulation. In US-Gambling, the Appellate Body exceeded its interpretative function as it created new rights and imposed new obligations on Members (Peng, 2014). In China Audiovisual Services, the WTO DSB took a necessary position on the issue of whether the definition of “sound recording distribution services” is alterable and evolutionary through time. The Appellate Body decided that the object and purpose of the GATS is to embrace all new technologies (Peng, 2014). Lastly, in China-Electronic Payments (2013), the WTO DSB created an integrated service by reconciling the classification of electronic payment services with the commercial reality of those services. The Panel stressed that such an interpretation is based on the objective of progressive liberalization contained in GATS (China-Electronic Payment, 2013).

## Conclusions

During the initial negotiations of WTO Agreements, e-commerce issues were not considered. Negotiations on introducing regulations on digital trade are at a standstill, and reaching an agreement under the consensus of all WTO Member States is unlikely in the near future. Thus, current WTO law must be applied and adapted to regulating e-commerce, and the role of the WTO DSB is of crucial importance in sorting disputes on digital trade.

WTO Agreements are incomplete contracts, thus judicial law making is inherent in the system. The WTO DSB has the necessary tools and capacity to engage in modernizing WTO law by engaging in judicial-activism. The binary nature of WTO law and WTO DSB preconditions that the dispute settlement process is aimed at not only settling a concrete dispute among parties, but also at reaching a decision that is coherent and beneficial to the whole WTO legal system. Moreover, when necessary, WTO DSB bodies employ legal sources that are relevant to the case and that go beyond WTO law, bringing the law itself up to date. Thus the law provides the theoretical capacity and conditions for the WTO DSB to modernize WTO law.

Given the competencies and prior practice of the WTO DSB, it may be relied upon for engaging in the modernization of WTO law by employing means of developing, or in times even expanding, the DSB's discretion. The study of prior cases shows that the attempts of the WTO DSB to modernize WTO law are within the scope of its competencies and role in settling disputes. The WTO DSB acting as a court may have a significant impact on the future regulation of global digital trade by customizing WTO law with regard to digital trade.

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